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KARLA PALACIO SEPULVEDA

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE M. IRMA E. GONZALEZ)

UNITED STATES OF AMERICA, Plaintiff, v. KARLA PALACIO SEPULVEDA, Defendant.	CASE NO. 07CR3394-IEG DATE: APRIL 28, 2007 TIME: 2:00 P.M. **NOTICE OF MOTION AND MOTIONS: TO:** PRECLUDE 404(b) EVIDENCE; PRECLUDE 403 EVIDENCE; PRECLUDE 609 EVIDENCE; AND LEAVE TO FILE ADDITIONAL MOTIONS

TO: **KAREN P. HEWITT, UNITED STATES ATTORNEY, AND REBECCA S. KANTER, ASSISTANT UNITED STATES ATTORNEY:**

PLEASE TAKE NOTICE that on April 28, 2008, at 2:00 p.m., or as soon thereafter as counsel may be heard, the defendant, KARLA PALACIO SEPULVEDA, through his attorney Marc X. Carlos, will bring the below listed motions.

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MOTIONS

The defendant, KARLA PALACIO SEPULVEDA, through his counsel, Marc X. Carlos, hereby moves this Court to:

1) PRECLUDE 404(B) EVIDENCE;

2) PRECLUDE 403 EVIDENCE;

3) PRECLUDE 609 EVIDENCE; AND

4) GRANT LEAVE TO FILE ADDITIONAL MOTIONS.

These motions are based upon the instant motions and notice of motions, the attached statement of facts and the memorandum of points and authorities, the records in the above-entitled cause, and any and all further matters that may be brought to the Court's attention in the hearing on these motions.

Respectfully submitted,

Dated: April 14, 2008

S/Marc X. Carlos
Marc X. Carlos
Attorney for Defendant
KARLA PALACIO SEPULVEDA

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Attorney for Defendant
KARLA PALACIO SEPULVEDA

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE IRMA E. GONZALEZ)

UNITED STATES OF AMERICA, Plaintiff, v. KARLA PALACIO SEPULVEDA, Defendant.	CASE NO. 08CR3394-IEG DATE: APRIL 28, 2008 TIME: 2:00 P.M. **POINTS AND AUTHORITIES IN SUPPORT OF MOTIONS TO:** PRECLUDE 404(b) EVIDENCE; PRECLUDE 403 EVIDENCE; PRECLUDE 609 EVIDENCE; AND LEAVE TO FILE ADDITIONAL MOTIONS

STATEMENT OF THE CASE

In the instant case, defendant KARLA PALACIO SEPULVEDA (hereinafter "Ms. PALACIO") is charged in a two-count indictment of Importation of Marijuana and Possession of Marijuana with Intent to Distribute, in violation of Title 21, U.S.C. §§ 952, 960 and 841(a)(1).

Count 1 of the indictment specifically alleges that on or about December 5, 2007, within the Southern District of California, defendant KARLA PALACIO SEPULVEDA did knowingly and intentionally import approximately 38.62 kilograms of marijuana into the United States from a place outside thereof. Count 2 alleges that on the same date and place, said defendant did knowingly and intentionally possess, with intent to distribute, approximately 38.62 kilograms of marijuana.

Ms. PALACIO has entered a not guilty to all charges.

POINTS AND AUTHORITIES

I.

MOTION TO COMPEL ANY and ALL 404(b) EVIDENCE

A. The Government Has Not Complied With The Notice Requirements of Fed. R. Evid. 404(b).

Fed. R. Evid. 404(b) requires that the Government give notice of the "general nature" of any prior act evidence that it may seek to introduce. As of this writing, defense counsel assumes that the Government will seek to admit whatever prior convictions it can. Because the Government has provided no notice of the "general nature" of such evidence -- let alone discovery -- any such evidence should be excluded for failure to comply with Rule 404(b).

B. 404(b) Evidence Must be Excluded.

In this country it is a settled and fundamental principle that persons charged with crimes must be tried for what they allegedly did, not for who they are. United States v. Hodges, 770 F.2d 1475, 1479 (9th Cir. 1985). The Ninth Circuit Court of Appeals has observed:

> Under our system, an individual may be convicted only for the offense of which he is charged and not for other unrelated criminal acts which he may have committed. Therefore, the guilt or innocence of the accused must be established by evidence relevant to the particular offense being tried, not by showing that defendant engaged in other acts of wrongdoing.

Id.

No matter how vile or despicable a person may appear to be, he or she is entitled to a fair trial. Id. Constitutional provisions clearly provide that individuals may only be convicted for the crimes with which they are charged; they may not be subject to criminal conviction merely because they have a detestable or abhorrent background. Id. "Our entire system of justice would deteriorate if we did not jealously protect these constitutional safeguards for **all** citizens." South Dakota v. Moeller, 548 N.W. 2d 465, 468 (S.D. 1996) (referring to prior acts evidence).

Ms. PALACIO moves to exclude evidence of any prior convictions. As of this writing, defense counsel is unaware of any prior convictions revealed through the process of discovery. However, if the government is aware of any prior convictions, defense counsel reserves the right to move this Court to preclude the government from presenting this 404(b) evidence during trial.

II.

EVIDENCE OF Ms. PALACIO'S PRIOR CRIMINAL HISTORY IS PREJUDICIAL AND SHOULD NOT BE ADMITTED

It is anticipated that if Ms. PALACIO testifies, the Government will attempt to introduce all or some of her prior convictions, if any, as impeachment material under Rule 609(a)(1) of the Federal Rules of Evidence. However, even under Rule 609(a)(1), such evidence is inadmissible.

Rule 609 provides:

> (a) General rule. For the purpose of attacking the credibility of a witness, (1)evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs the prejudicial effect to the accused.

Fed. R. Evid. 609(a)(1) (emphasis added). The plain language of Rule 609(a)(1) and the 1990 Advisory Committee Note clearly indicate that the standard governing the admissibility of a criminal defendant's prior felony conviction is more stringent than the standard governing the admissibility of prior felony convictions of other witnesses. See 3 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence, § 609[04], at 609-42 (1996) ("The amended Rule 609(a)(1) was intended to resolve the problems of fairness by treating criminal defendants differently from other witnesses. The Advisory Committee was aware of the 'unique risk of prejudice' faced by criminal defendants who want to testify on their own behalf: that prior conviction evidence will be 'misused by a jury as propensity evidence.'") (quoting 1990 Advisory Committee Note). Specifically, in cases where the witness is not a criminal defendant, it is presumed that the prior conviction is admissible and therefore the party seeking exclusion has the burden of showing that the probative value of the prior conviction "is substantially outweighed by the danger of unfair prejudice" under Rule 403. Such a standard, however, does not apply to the prior convictions of testifying criminal defendants. Rather, there is a presumption against the admission of a criminal defendant's prior conviction and "[t]he Government bears the burden of showing . . . that the proffered evidence's probative value substantially outweighs its prejudicial effect." United States v. Alexander, 48 F.3d 1477, 1488 (9th Cir. 1995) (emphasis added), cert. denied, 516 U.S. 878 (1995).

Whether the Government has successfully rebutted the presumption against admissibility depends on the balancing of five factors outlined by the Ninth Circuit in United States v. Cook, 608 F.2d 1175 (9th Cir. 1979) (en banc), *overruled on other grounds*, Luce v. United States, 469 U.S. 38 (1984). These factors are: (1) the impeachment value of the prior conviction; (2) the temporal relationship between the conviction and the subsequent history of the defendant; (3) the similarity between the prior offense and the offense charged; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. Cook, 608 F.2d at 1185 n.8 (citing Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968)).

The Government must show that the probative value of Ms. PALACIO's prior convictions substantially outweigh its prejudicial effect in order to rebut the presumption against admissibility. Should the Therefore, should Ms. PALACIO choose to testify on her behalf, such 609 evidence should not be admissible.

III.

Ms. PALACIO REQUESTS LEAVE TO FILE FURTHER MOTIONS

At the time of preparation of these motions, Ms. PALACIO and defense counsel have received some discovery from the Government. It is therefore requested that defense counsel be allowed the opportunity to file further motions should more issues arise as a result of additional discovery being provided by the Government.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the court grant the above motions.

Respectfully submitted,

DATED: April 14, 2008

S/Marc X. Carlos
MARC X. CARLOS
BARDSLEY & CARLOS, L.L.P.
Attorney for Defendant
KARLA PALACIO SEPULVEDA